MM DKT. 92-51

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License	))))	MMB File No. 910221A

To: The Commission

JOINT COMMENTS ON PETITION FOR DECLARATORY RULING

CAPSTAR COMMUNICATIONS, INC.
COMMAND COMMUNICATIONS, INC.
JONES EASTERN BROADCASTING, INC.
LEGACY BROADCASTING, INC.
LIGGETT BROADCAST, INC.
SINCLAIR BROADCAST GROUP, INC.

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SUMMARY

These Joint Comments demonstrate that to permit security interests in Commission licenses would violate the Communications Act, and at a minimum, be contrary to the public interest.

A security interest in a Commission license is clearly a right in a license of the sort prohibited by the Communications Act. It gives a party other than the designated licensee an immediate claim to possession of the license, which claim travels with the license in perpetuity regardless of who subsequently holds it. Permitting security interests in licenses would lead to the constant adjudication of license rights in forums other than the Commission, as secured parties would continuously go to local courts to enforce their interests in the license, and competing secured parties would constantly adjudicate their respective claims to the license in local courts prior to default. This is precisely the result the Communications Act seeks to avoid, and the Commission is powerless to rewrite the statute otherwise.

Moreover, even if not mandated by the Act, there is no justification for altering the prohibition on security interests in licenses. Permitting such interests would be a permanent (and unlawful) remedy for a temporary problem. Moreover, security interests in licenses simply are not vital to acquisition financing. If a transaction makes business sense, a lender will make funding available, and vice versa. In short, the Commission has no power to permit security interests in licenses, and in any event, there is no justification for doing so. The Petition for Declaratory Ruling should therefore be denied.

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JOINT COMMENTS ON PETITION FOR DECLARATORY RULING

Capstar Communications, Inc.; Command Communications, Inc.; Jones Eastern Broadcasting, Inc.; Legacy Broadcasting, Inc.; Liggett Broadcast, Inc.; and Sinclair Broadcast Group, Inc. (hereinafter the "Companies"),[1/] by their attorneys and pursuant to the Commission's Public Notice released March 15, 1991 (Mimeo No. 12198),[2/] hereby submit these comments on the Petition for Declaratory Ruling ("Petition") filed on February 21, 1991 by the law firm of Hogan & Hartson. The Petition seeks a declaratory ruling that a third-party creditor may take a limited security

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1/ Each of the Companies and their various subsidiaries own and operate a number of broadcast stations throughout the United States. Each Company has been active for a number of years in acquiring and selling broadcast properties. The Companies believe their experience in broadcast acquisition provides them with unique expertise that will aid the Commission in its consideration of the Petition for Declaratory Ruling.

2/ These Comments are timely filed by virtue of the Commission's Order Granting Request for Extension of Time to File Comments, DA 91-472 (released April 11, 1991), which extended until this date the time for filing comments in this proceeding.

interest in an FCC license. For the reasons set forth herein, the Petition should be denied.

INTRODUCTION

1. There is no serious question that the availability of broadcast acquisition financing is not what it was several years ago. However, permitting lenders to take a security interest in a license will not make acquisition financing more plentiful. The slow financing market is the result of economic forces which have nothing to do with taking a security interest in a broadcast license. The issue presented is whether the Commission can rewrite the Communications Act and decades of policy that derive from it in a doomed effort to create a permanent remedy for a temporary problem.

2. As discussed below, to permit security interests in broadcast licenses would violate several provisions of the Communications Act of 1934, as amended. The Commission therefore lacks power to grant the relief the Petition requests. Moreover, even if the policy were not statutorily mandated, there is no justification for eliminating or altering it. The Companies therefore submit that the Petition must be denied.

DISCUSSION

I. The Holding of a Security Interest in a Commission License Is Prohibited by the Communications Act

3. There is no dispute as to the operative law involved in this proceeding, only a question as to how it should be

interpreted. Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, provides that the Act's purpose, inter alia, is "to provide for the use of [channels of radio transmission], but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." (Emphasis added). Furthermore, Section 304 of the Act requires applicants to waive any claim to the use of any particular frequency as against the regulatory power of the United States. Section 309(h) provides that a license does not "vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof" (emphasis added), and Section 310(d) provides that no license may be assigned or transferred without prior Commission approval.

4. These provisions, particularly Sections 301 and 304, are designed to ensure the federal government's ultimate control over radio frequencies by making sure that no vested or property right -- or any other right beyond the terms of the license -- can be asserted as against the government. But this prohibition on vested rights clearly would be incomplete if it applied solely to the government's designated licensee. Section 301 states that no license shall be construed to create "any right" beyond the license's terms and conditions. (Emphasis added). See also Petition at 16 (quoting 68 Cong. Rec. at 2871 (statement of Sen. Watson) ("[W]e were so exceedingly anxious to prevent any vested

right in any wave length or any right to use the ether for any purpose other than [as] prescribed in the license. . . ." (emphasis added). Since every license denotes a single licensee, a right by a third party (creditor) to hold a claim to the license plainly is a right beyond the terms of that license. Congress clearly enacted Sections 301, 304 and 309(h) to prevent any party other than the licensee (who itself statutorily holds the license only under limited terms and conditions) from asserting a claim to the use of the frequency adverse to the federal government's ultimate control -- that is, a right to spectrum other than that which the government confers upon the named licensee.

5. This prohibition takes two forms. First, it forbids the licensee itself from laying claim to a right to broadcast other than in the manner, and for the length of time, granted by the government. Thus, to retain the privilege of using the spectrum, a licensee is required to serve the public interest, it is required to apply for a renewal of its license prior to its expiration, and the Commission is required to find that the public interest would be served before it grants the licensee a further term.

6. Second, the prohibition bars a party other than the licensee -- who alone is accountable to the Commission -- from acquiring a right to use spectrum which would preclude, or conflict with, the licensee's approved use of the spectrum. To avoid such conflicts, Section 310(d) of the Act requires prior Commission approval of any assignment or transfer of a license

before it is effectuated. Moreover, the Commission forbids assignments or transfers which contain automatic rights of reversion in the seller, because such rights can be exercised immediately upon default without opportunity to approve the seller's reacquisition of an interest. See Section 73.1150 of the Commission's Rules.

7. From the moment that a security interest attaches, "the secured party has a legally protected property right in the collateral." T. Quinn, Uniform Commercial Code Commentary and Law Digest, § 9-101[d] (1978). Under the Uniform Commercial Code ("UCC"), the prime feature of a security interest is that it gives a creditor (third party or otherwise) an immediate right to take possession of the collateral upon the debtor's default on the underlying obligation.[3/] UCC § 9-503. With the collateral in his possession, the creditor may sell it -- by either public or private sale -- and apply the proceeds in satisfaction of the debt (id. § 9-504), or may keep the collateral in satisfaction of the debt, subject to prior notice to the debtor (id. § 9-505(2)).

3/ UCC § 9-104(a) excludes from the Code's scope "a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." If, as the Petition suggests, the Communications Act does not directly prohibit the obtaining of a security interest in a license, the UCC provisions discussed above are fully applicable, and under these provisions, a security interest in a license is nevertheless clearly a property interest precluded by the Act. Conversely, if security interests in licenses are subject to the Communications Act, they must necessarily be prohibited by the Act. Under either scenario, therefore, security interests in licenses are prohibited by the Act, and the Commission lacks power to grant the relief the Petition requests.

The Petition's proposed "limitation" on such interests -- that the licensee retain voting rights pending prior Commission approval of the transfer to the secured party -- misses the point. Even with this limitation, a security interest would nonetheless allow the lender immediately to take possession of the license without Commission approval, rendering any voting rights in the licensee essentially meaningless. Furthermore, a security interest would give its holder a property right in the license that is independently enforceable outside the bounds of the Commission's statutory control.

8. Moreover, a security interest is continuing in nature, and it is valid even if the collateral is assigned. Id. § 9-205. Thus, a security interest in a license would give the secured party a perpetual right to possession of the license, no matter whom the Commission might approve as licensee. Furthermore, since most security agreements require the consent of the secured party to any disposition of the collateral, allowing security interests in licenses would severely hinder legitimate transactions by which licenses are assigned.

9. As the foregoing discussion demonstrates, a security interest, when attached to a Commission license, is clearly a right in a license of the sort prohibited by the Communications Act. It gives a party other than the designated licensee an immediate claim to possession of the license, which claim travels with the license in perpetuity regardless of who subsequently holds it. While the Petition states that the Commission is free to fashion limitations on the holding of a security interest in a

license,[4/] the limitations it proposes do not in any way alter those attributes of a security interest that make it a property interest prohibited by the Act.

10. Since any security interest in a license is barred by the Communications Act, the Commission is powerless to grant the relief the Petition requests. "Only Congress can rewrite [the Communications Act]." Louisiana Public Service Commission v. FCC, 476 U.S. 355, 376 (1986); see also Talley v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977) (agencies no more authorized than courts to rewrite acts of Congress). Thus, the Petition can advance its request only by making the novel argument that the Act merely prohibits property rights in spectrum, not property rights in licenses.

11. This attempted end-run around the square prohibitions of the Act, while inventive, is nonetheless disingenuous. Since Congress wished to preclude any party from laying a vested claim to the airwaves as against the federal government, it provided that the government should issue licenses, limited in term, as the only means of acquiring access to spectrum. Therefore, for all practical purposes, a license is radio spectrum.

12. Moreover, both the pertinent provisions of the Act and the congressional statements cited in the Petition speak not of the airwaves themselves, but of rights in the airwaves or uses of

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4/ That the Commission may preempt the UCC by fashioning its own regulatory scheme regarding security interests in licenses is a questionable notion in itself. UCC Section 9-104 excludes security interests subject to any statute of the United States, and of course, Commission rules are not statutes. Thus, any rules the Commission might adopt would not automatically preempt the UCC.

the airwaves. Section 301 of the Act provides that no license shall be construed "to create any right beyond the terms, conditions, and periods of the license" (emphasis added). Section 304 requires a waiver "of any claim to the use of any particular frequency" as against the government. (Emphasis added). Section 309(h) mandates that a license "shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies" beyond those contained in the license. (Emphasis added). See also Petition at 15 (quoting 68 Cong. Rec. at S2870-71 (statements of Sens. Dill and Watson) ("I do not believe . . . that any man who will study the legislation can find in it justification for the claim that the operator of a station will get a vested right in the air"; "we were so exceedingly anxious to prevent any vested right in any wave length or any right to use the ether for any purpose other than [as] prescribed in the license").

13. Because the Act forbids vested rights in the spectrum, which rights are conferred exclusively via licenses, it is absurd to claim that a forbidden property right in a license is anything other than a forbidden right in the frequency itself. Indeed, if the Petition were correct in stating that licenses and spectrum are separate and distinct, and that a license is unrelated to the right to use spectrum, then a license would have no more value than that of the fiber and ink of which it is composed. No lender would lend millions of dollars secured only by the recycling value of a piece of paper. Thus, if the Petition's premise that a license does not represent a right to the spectrum

is correct, grant of the Petition would in no way increase the availability of broadcast financing.[5/]

14. The case of Kirk Merkley, Receiver, 94 F.C.C.2d 829 (1983) provides a striking illustration of the consequences that would result from allowing a lender to obtain a security interest in a license. Merkley involved an assignment agreement whereby the seller retained a prohibited reversionary interest in the station's license itself. When the buyer/licensee defaulted, the seller went to state court and actually obtained a judgment forfeiting the buyer's license, which judgment was upheld by the state supreme court. The Commission ultimately disregarded the state court ruling, and denied the claim of the receiver appointed by the court to hold the license, stating:

> Consequently, we find that to acknowledge the Receiver's claim at this point would be inappropriate, not only because it is derived from a reversion, but because it also jeopardizes our prior consent procedure.

94 F.C.C.2d at 839.

15. Were the Commission to allow lenders to take security interests, precisely this type of situation would occur regularly. Allowing such interests would increase the

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5/ Moreover, the fact that a license has an element of value to its holder does not compel the conclusion that a third party's security interest therein is or should be permissible. The Commission recognized this fact in Bill Welch, 3 FCC Rcd 6502 (1988), where it decided to allow the for-profit sale of "bare" Commission authorizations for unbuilt facilities. However, a transfer via a security interest in a license would produce a far different situation than that present in Welch, which involved no security interest.

possibility of unauthorized transfers of control of licenses. Further, permitting security interests in licenses would lead to the pervasive adjudication of license rights in forums other than the Commission. Not only would creditors continuously be seeking title to licenses in local courts pursuant to default provisions in security agreements, but competing secured parties constantly would be litigating claims to the license in local courts even before default. Such litigation of claims to FCC licenses in other forums demeans the Commission's absolute authority to approve license transfers.

16. Moreover, if the Commission can permit security interests in licenses, then a license must be considered a piece of property on which any conceivable type of lien may be placed. Thus, any creditor of a station -- be it a construction contractor, mechanic, or a terminated employee entitled to salary -- would be permitted to place a lien on the station's license to secure payment. This would create chaos for the Commission in carrying out its statutory duty of approving license assignments. The Commission would need to take cognizance of and resolve every claim by every creditor in every forum pursuant to any lien that has been attached to a license. The Commission is unlikely to possess sufficient resources to account for these myriad asserted rights, and the duty of resolving claims to licenses would likely spill out of the Commission's control. This is precisely the result that Congress sought to avoid.

17. The Communications Act seeks to ensure that no party asserts a claim to the use of the airwaves as against the

ultimate control of the government. As such, the Act prohibits any right to use radio spectrum that sweeps beyond the terms of the license the government issues to its designated grantee. A security interest in a license would be just that type of right -- an immediate and indefinite property right that could wreak havoc on the Commission's statutory mandate to issue licenses for limited terms, to review the performance of its licensees before granting further terms, and to pass on the qualifications of would-be transferees. Security interests in licenses are therefore flatly banned by the Communications Act, and the Commission is powerless to rewrite the statute.

II. Even If Not Required by the Communications Act, the Policy Against Security Interests in Licenses Is Well-Reasoned and Should Not Be Altered

18. Even were it the case that the Communications Act by its terms permits third-party lenders to obtain security interests in Commission licenses, and that the policy forbidding such interests is solely a Commission creation, it is not true that the policy is unrooted in "any longstanding and well-articulated Commission analysis." Petition at 7. On the contrary, the Commission's iterations of its policy follow directly from the language and intent of the Act, and there is no justification for changing the policy.

19. Putting aside the question of whether it is of recent creation (an issue irrelevant to its merit), the Commission's policy against security interests in licenses had its earliest direct and clear articulation in Radio KDAN, Inc., 13 R.R.2d 100

(1968).[6/] There, the Commission clearly explained its rationale for the policy and the fact that the policy was required by the Communications Act:

> The Commission has consistently held that a broadcast license (as distinguished from a station's plant or physical assets) may not be hypothecated by way of mortgage, lien, pledge, lease, etc. This principle, deriving ultimately from Section 301 of the Communications Act, is firmly rooted in Commission practice, its rationale being that such a hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust.

Id. at 102 (emphasis added).

20. Whether or not the Commission had in fact adopted a holding to this effect in the past, Radio KDAN, Inc. stands as a fully warranted and well-reasoned explication of Commission policy under the Act. As discussed in detail above, the Act's prohibition on "ownership" of spectrum contemplates that no party that is unaccountable to the government may have a right in a license. Most security/mortgage agreements place limitations on the use of the collateral and the assignment thereof. Thus, not only is a security interest or lien an immediately and

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6/ It is considerably doubtful that the policy had its genesis in Twelve Seventy, Inc., 1 F.C.C.2d 965 (1965), as the Petition suggests. Twelve Seventy is not cited in any subsequent cases discussing the policy. The sentence at p. 967 cited by the Petition -- "Credit cannot be extended in reliance upon the license as an asset from which the licensee's obligations may be satisfied . . . . " -- appears merely to be an articulation of the principle that a station's creditor cannot automatically assume that the station's license will be renewed, and therefore that his debt can be satisfied from the sale of the station as an ongoing business.

independently enforceable property interest in and of itself, but to the extent such an interest places limitations on the use and/or transfer of the license, a station is being perpetually operated subject to the will of a party neither known by or accountable to the Commission -- the secured party. The guiding principle is that a licensee's use of his authorization must be subject to the supervision of the Commission and no one else. A security interest in a license represents an additional source of supervision, and therefore a siphoning off of government authority -- a result plainly contrary to the Act's intent.

21. The Merkley case, discussed supra, provides further justification for the policy against security interests in Commission licenses. While Merkley dealt directly with a reversionary mortgage provision concerning a license, the Commission equated that provision with a security interest in a license and pointed out how such interests contravene the Commission's duty of prior consent to license assignments and transfers. Finally, the Commission's decision in Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 F.C.C.2d 1249 (1985), while again not directly discussing security interests in licenses, did state that alternative financing arrangements were available that would not "jeopardiz[e] the independence of the licensee." Id. at 1254.

22. It is therefore unfair as well as erroneous to claim, as does the Petition, that the policy is based solely on "dicta and a misreading of the Act and judicial decisions." Petition at 12. To the contrary, the prohibition against security interests

in Commission licenses is not only mandated by the very terms of the Act, but at a minimum is a policy necessarily required by the statute.

23. Moreover, even if the Commission had the power to alter or modify the prohibition, there exists no colorable policy reason for doing so. As we have seen, the prohibition is necessary to preserve the Commission's right and responsibility to approve all assignments and transfers of licenses. Further, the prohibition safeguards against the possibility of rights to licenses being litigated in all kinds of local forums as well as the Commission. See Merkley, supra.

24. Given these benefits, it would be the height of irresponsibility to change a decades-old policy merely in response to market conditions that may not even exist several years hence. The Petition itself concedes that several years ago, "the values of broadcast stations were increasing year to year by significant margins, and . . . credit for broadcast acquisitions was readily available" without a right to obtain a security interest in a license. Petition at 4. Of course, the state of the lending market at any given time is the result of an infinite number of external factors that are nearly impossible to predict with certainty.

25. The Companies simply do not share the Petition's belief that security interests in licenses will make more credit available for mass media transactions. If a proposed transaction makes business sense -- i.e., if, considering the size of the market, competition, expertise of the proposed operators, and

technical specifications of the property being acquired, the transaction appears capable of generating sufficient revenue to pay off the loan -- the lender will provide financing. If the opposite is true, the lender will not provide financing, whether or not he is granted a security interest in the license. The Companies know of no instance in which financing has not been advanced due solely to the lender's inability to obtain a security interest in the license.[7/]

26. Thus, even if the Commission had the power to rewrite the Communications Act as the Petition requests, the Companies see no reason for the Commission to alter a prohibition which carries such concrete public benefits. Given the fact that the availability of security interests in licenses have so little bearing on the actual provision of financing, and that today's market conditions may not be present tomorrow, it would be imprudent for the Commission to change a decades-old policy.

III. The Permissibility of Stock Pledge Agreements Does Not Compel the Legality of Security Interests in Commission Licenses

27. The Petition equates security interests in Commission licenses with stock pledges, arguing that since the latter are

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7/ Indeed, if the Commission wishes to adopt a policy that would spur lender financing of broadcast properties, it should raise the limit on the number of stations a licensee may own. This would enable station operators to apply loan funds over more properties than are presently permitted, thus lessening the degree of risk that lenders take in providing lines of credit for acquisition of a small number of stations which all prove unviable. Such a rule change would thus encourage third-party investment without rewriting the Communications Act.

permissible under Commission policy, the former also should be. There are, however, important distinctions between the two. Stock pledges involving Commission licenses expressly provide that voting rights, and thus ultimate control of the station, will be retained by the licensee even if the pledged stock is transferred. In contrast, security agreements would allow a party to take complete control of the license. They therefore repose ultimate control in the secured party from the moment they are executed, and as a result, they jeopardize the licensee's independence in violation of the Communications Act.

28. Moreover, the Commission allows pledgees to foreclose on pledged stock without Commission approval only to the extent that actual control of the license is not transferred. If 50% or more of the licensee's stock is foreclosed under a pledge agreement, prior Commission approval is required, and the agreements so provide. On the other hand, a security agreement entitles the secured party to <u>immediately</u> take <u>full possession and control</u> of the license upon the debtor's default no matter how minor, or technical. The Commission's obligation to examine and approve/deny any transfer is therefore preserved in the case of stock pledges, but not in the case of security interests in licenses. In short, there are vital distinctions between stock pledges and security agreements, and the two cannot properly be equated.

CONCLUSION

The prohibition against security interests in Commission licenses is mandated by an Act of Congress, and the Commission

therefore has no power to eliminate or alter that prohibition. Even if it had that power, there is absolutely no policy justification for such an action. Accordingly, the Companies respectfully submit the Petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deniece B. Phillips, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "JOINT COMMENTS ON PETITION FOR DECLARATORY RULING" were sent this 22nd day of April, 1991, by first class United States mail, postage prepaid, to the following:

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